No. 88-910

Supreme Court, U.S.
FILED
DEC 2 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

AMOS D. FAUX-BURHANS,

Petitioner,

vs.

BOARD OF COUNTY COMMISSIONERS OF FREDERICK COUNTY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PAUL VICTOR JORGENSEN
Attorney for Petitioner
P.O. Box 850
215 West Main Street
Middletown, Maryland 21769
(301) 293-2212

8180
Lutz Appellate Printers, Inc. • NJ (201) 257-6850 • (800) 3 APPEAL • NY (212) 840-4640 • MA (617) 542-1114
DC (202) 783-7288 • PA (215) 925-6500 • USA (800) 5 APPEAL

64 pp

Petitioner Amos D. Faux-Burhans respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on September 9, 1988.

Question Presented

Does the Federal Aviation Act of 1958, as amended, preempt a local government from exercising its police powers to enact zoning restrictions on the use of navigable airspace at a private airport?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	1
Statutory Provisions	1
Statement of the Case	6
Reasons for Granting the Writ	9
1) The Fourth Circuit's Holding That Federal Law Does Not Preempt Zoning of Navigable Airspace by A Local Government Conflicts With Decisions of the Courts of Appeals of the Second, Ninth, and Eleventh Circuits	9
2) The Court of Appeals Has Decided An Important Federal Question In Conflict With Applicable Decisions of This Honorable Court	22
3) The Court of Appeals Has Decided An Important Question of Federal Law In a Way That Could Lead To Disaster in the Skies and Frustration of Congressional Purpose	28

Conclusion 29

Appendices A-1 to D-2

Appendix A: Decision of the United States Court of Appeals for the Fourth Circuit A-1 to A-6

Appendix B: Memorandum Opinion of the United States District Court for the District of Maryland B-1 to B-13

Order and Judgment B-14 to B-15

Appendix C: Denial of Petition for Rehearing with Suggestion for Rehearing In Banc C-1 to C-2

Appendix D: Frederick County Zoning Ordinance Section 1-19-381 D-1 to D-2

Certificate of Service

TABLE OF AUTHORITIES

A. Table of Cases

Case	Reference
Allegheny Airlines v. Village of Cedarhurst, 238 F. 2d 812 (2d Cir. 1956)	11,16
American Airlines, Inc. v. Town of Hempstead, 272 F. Supp. 226, 232 (EDNY 1967)	11,15,16,17
Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973)	20,25,26
Faux-Burhans v. Board of County Commissioners, 674 F. Supp. 1172 (1987)	1
Lockheed Air Terminal, Inc. v. City of Burbank, 318 F. Supp. 914, 921 (CD Calif., 1970)	11,15,17
Northwest Airlines v. Minnesota, 322 U.S. 292 (1944)	23
Pirolo v. City of Clearwater, 711 F. 2d 1006 (11th Cir. 1983)	10,21
San Diego Unified Port District v. Gianturco, 651 F. 2d 1306 (9th Cir. 1981)	10,21

Schneideman v. ANR Pipeline Company, 56 USLW 4249 4254 (March 22, 1988) 29

United States v. Causby, 328 U.S. 256 (1946) 24

United States v. New Haven, 447 F. 2d 972 (2nd Cir. 1971) 10,18,21

B. Statutory Authorities

Statute	Reference
14 C.F.R. Part 157	13
28 U.S.C. § 1254(1)	1
28 U.S.C. § 1331	8
28 U.S.C. § 1343	8
42 U.S.C. § 1983	8
49 U.S.C.S. Appx. § 1301	2,14
49 U.S.C.S. Appx. § 1303	29
49 U.S.C.S. Appx. § 1304	3,11,14,29
49 U.S.C.S. Appx. § 1348	3,12,13,22
49 U.S.C.S. Appx. § 1350	5,13
49 U.S.C.S. Appx. § 1508	6,11,13-14
U. S. Constitution, Article VI.	1

C. Other Authorities

Authority	Reference
H.R. 2360, U.S. Code Cong. & Admin. News, 85th Cong., 2d Sess., Vol. 2, pp. 3741-2 (1958)	12
H.R. Report No. 572, 69th Cong. 1st Sess., p. 10	15

Opinions Below

The opinion of the Fourth Circuit (Appx. A, pp. A-1 to A-6) is unpublished. The opinion and judgment of the United State District Court for the District of Maryland (App. B, pp. B-1 to B-15) are published as Faux-Burhans v. Board of County Commissioners, 674 F. Supp. 1172 (1987).

Jurisdiction

The United States Court of Appeals for the Fourth Circuit entered its opinion on September 9, 1988, and denied Mr. Faux-Burhans' petition for reconsideration on October 7, 1988. (App. C, pp. C-1 to C-2) This Honorable Court has jurisdiction under 28 U.S.C. § 1254(1).

Statutory Provisions

U. S. Constitution, Article VI. Clause 2. Supreme law.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

49 U.S.C.S. Appx. § 1301. Definitions.

* * * *

(5) "Aircraft" means any contrivance now known or hereafter invented, used, or designed for navigation of or flight in the air.

* * * *

(29) "Navigable airspace" means airspace above the minimum altitudes of flight prescribed by regulations issued under this Act, and shall include airspace

needed to insure safety in takeoff and landing of aircraft.

* * * *

49 U.S.C.S. Appx. § 1304. Public right of transit.

There is hereby recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States.

* * * *

49 U.S.C.S. Appx. § 1348. Airspace control and facilities.

(a) Use of airspace. The Administrator is authorized and directed to develop plans for and formulate policy with respect to the use of the navigable airspace; and assign by rule, regulation, or order the use of the navigable airspace under such terms, conditions, and limitations as he may deem necessary in

order to insure the safety of aircraft and the efficient utilization of such airspace. He may modify or revoke such assignment when required in the public interest.

* * * *

(c) Air traffic rules. The Administrator is further authorized and directed to prescribe air traffic rules and regulations governing the flight of aircraft, for the navigation, protection, and identification of aircraft, for the protection of persons and property on the ground, and for the efficient utilization of the navigable airspace, including rules as to safe altitudes of flight and rules for the prevention of collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects.

* * * *

49 U.S.C.S. Appx. § 1350. Establishment or construction of airports and landing areas not involving expenditure of Federal funds.

In order to assure conformity to plans and policies for, and allocations of, airspace by the Administrator under section 307 of this Act [49 U.S.C.S. § 1348], no airport or landing area not involving expenditure of Federal funds shall be established, or constructed, or any runway layout substantially altered unless reasonable prior notice thereof is given the Administrator, pursuant to regulations prescribed by him, so that he may advise as to the effects of such construction on the use of airspace by aircraft.

* * * *

49 U.S.C.S. Appx. § 1508. Declaration of national sovereignty in air space; operation of foreign aircraft.

(a) The United States of America is hereby declared to possess and exercise complete and exclusive national sovereignty in the airspace of the United States, including the airspace above all inland waters and the airspace above those portions of the adjacent marginal high seas, bays, and lakes, over which by international law or treaty or convention the United States exercises national jurisdiction.

Statement of the Case

Petitioner Amos D. Faux-Burhans' airport is located on a 125 acre parcel in a rural part of Frederick County, Maryland. In 1977 Respondent Board of County Commissioners of Frederick County (referred to as "Frederick County")

enacted a zoning ordinance containing a special exception for an "aircraft landing and storage area" in agriculturally zoned districts. This exception restricted the user of a landing area to its owner and two aircraft, required a minimum clear zone, limited the type of aircraft that could use it, and prohibited use of the airfield for training or instruction. (Appx. D, pp. D-1 to D-2)

At the time Frederick County enacted this ordinance, Mr. Faux-Burhans' father-in-law, Charles Rice, owned the 125 acre parcel. In 1980 Mr. Rice obtained an exception for an aircraft landing and storage area on the parcel and set up a small airport. In 1983 Mr. Faux-Burhans bought the property and further improved the airport.

The FAA inspected the airport, conducted an aeronautical study, and

granted Mr. Faux-Burhans approval for its use. Noticing the improvements, county inspectors warned Mr. Faux-Burhans that the airport was governed by the local zoning ordinance and that violations could result in a civil penalty.

Mr. Faux-Burhans sued Frederick County in federal district court for the district of Maryland, invoking federal jurisdiction under 28 U.S.C. §§ 1331 & 1343. Mr. Faux-Burhans sought a declaration that the Federal Aviation Act of 1958, as amended, preempts zoning restrictions on the use of navigable airspace at his airport. He sought damages under 42 U.S.C. § 1983, alleging that the restrictions constitute action under color of state law depriving him of his right to freedom of transit through navigable airspace.

The district court granted summary judgment against Mr. Faux-Burhans, and the Court of Appeals for the Fourth Circuit affirmed in an unpublished decision. The Fourth Circuit's decision did not attempt to distinguish its holding from the many decisions by other circuit courts and this Court ruling that only the federal government may restrict the use of navigable airspace.

Reasons for Granting the Writ

1) The Fourth Circuit's Holding That Federal Law Does Not Preempt Zoning of Navigable Airspace By a Local Government Conflicts With Decisions by the Courts of Appeals for the Second, Ninth, and Eleventh Circuits

The zoning provisions under challenge do not distinquish between ground-based and flight activities at the airport, such as landings and departures, but restrict all uses. The district

court found that Frederick County's zoning "regulates intensity of use (by number of aircraft), the type of aircraft that can use the facility (by takeoff distance required), the clear zone at the runway ends (by prohibiting building thereon), . . . and the type of aircraft operations (by prohibiting instructional flights)." (App. B, pp. B-7 to B-8). These are all areas of aeronautical regulation that other federal courts of appeals have ruled are the exclusive province of the federal government. Pirolo v. City of Clearwater, 711 F. 2d 1006 (11th Cir. 1983); San Diego Unified Port District v. Gianturco, 651 F. 2d 1306 (9th Cir. 1981); United States v. New Haven, 447 F. 2d 972 (2nd Cir. 1971), on rem. 367 F. Supp. 1338 (D.C. Conn., 1973), affirmed 496 F. 2d 452 (2d Cir. 1974) cert. den. & app. dism'd 419 U.S.

958; Lockheed Air Terminal, Inc. v. City of Burbank, 318 F. Supp. 914 (CD Calif., 1970), affirmed 457 F.2d 667 (9th Cir., 1972), affirmed 411 U.S. 624 (1973); American Airlines, Inc. v. Hempstead, 272 F. Supp. 226 (E.D.N.Y. 1967), affirmed 398 F. 2d 369 (2nd Cir. 1968), cert. den. 393 US 1017; Allegheny Airlines v. Village of Cedarhurst, 238 F. 2d 812 (2d Cir. 1956).

Congress has proclaimed that the United States government exercises complete and exclusive sovereignty over the airspace of the United States. 49 U.S.C.S. Appx. § 1508(a). As part of the exercise of this sovereignty, Congress has guaranteed all citizens of the United States a right of freedom of transit through navigable airspace. 49 U.S.C.S. Appx. § 1304. The term "navigable airspace" is defined to include airspace

needed to insure safety in the departure and landing of aircraft. 49 U.S.C.S. Appx. § 1301(29).

The public right of freedom of transit through such airspace is circumscribed only by the authority of the federal government. 49 U.S.C.S. Appx. § 1348 confers on the FAA Administrator plenary authority over the regulation and management of all navigable airspace. H.R. 2360, U.S. Code. Cong. & Admin. News, 85th Cong., 2d Sess., Vol. 2, pp. 3741-2 (1958).

Subsection 1348(a) directs the Administrator to develop plans for the use of navigable airspace, and to assign use of navigable airspace subject to appropriate conditions. Subsection 1348(c) orders the Administrator to prescribe air traffic rules to govern the flight of aircraft.

The only government authority other than the FAA Administrator that may exert power over navigable airspace is the military. Under subsection 1348(f), the military may authorize deviation from the Administrator's air rules when essential to the defense of the United States because of a military emergency.

In order to ensure conformity with the Administrator's rules and allocations of airspace under the above provisions, 49 U.S.C.S. Appx. § 1350 requires prior notice to the Administrator before any airport such as that owned by Mr. Faux-Burhans can be established. The agency has implemented this requirement in its regulations found at 14 C.F.R. Part 157.

Size and form of ownership of navigable airspace at airports does not affect federal authority over it. 49

U.S.C.S. Appx. § 1508(a) states that the federal government possesses and exercises "exclusive national sovereignty" over all of the airspace of the United States, not just regional airports serving major airliners. And 49 U.S.C.S. Appx. § 1304 declares a right of freedom of transit through navigable airspace held by "any citizen of the United States," not only air carriers and users of passenger jets. Indeed, the Federal Aviation Act defines "aircraft" to mean "any contrivance now known or hereafter invented, used, or designed for navigation of or flight in the air." 49 U.S.C.S. Appx. § 1301(5).

Federal preemption of navigable airspace, originating with the Air Commerce Act of 1926, applies to airspace adjacent to private as well as public airports. Legislative history of the Air Commerce Act evidences Congress's intent

to impose a public right of transit through navigable airspace "regardless of the ownership of the adjacent or subjacent soil." H.R. Report No. 572, 69th Cong. 1st Sess., p. 10.

The history of the Federal Aviation Act of 1958 shows that Congress vested "unquestionable authority for all aspects of airspace management in the Administrator of the new Agency [the Federal Aviation Administration]." Lockheed Air Terminal, Inc. v. City of Burbank, supra, 318 F. Supp. at 921. As one court has noted:

> "It would be difficult to visualize a more comprehensive scheme of combined regulation, subsidization and operational participation than that which the Congress has provided in the field of aviation." American Airlines, Inc. v. Town of Hempstead, supra, 272 F. Supp. at 232.

Every federal court of appeals that has examined the Federal Aviation Act and

its predecessors has concluded that Congress has preempted state and local governments from using their police powers to regulate aircraft use at local airports. In Allegheny Airlines v. Village of Cedarhurst, supra, 238 F. 2d 812, the Second Circuit ruled that a local township's ordinance prohibiting flight below 1000 feet over the village was preempted by federal law. The court rejected the argument that exclusive federal sovereignty attaches only to airspace above normal flight altitudes, ruling that federal control also extends to take-off and landing approaches at airports. Id. at 815.

In American Airlines, Inc. v. Hempstead, supra, 398 F. 2d 369, the Second Circuit affirmed an injunction against the enforcement of an airport noise ordinance which would have diverted

aircraft from their normal approaches to Kennedy Airport. The court ruled that the local ordinance was preempted, since compliance would conflict with federal flight patterns.

Shortly after American Airlines, a federal court in California struck down an ordinance enacted by the City of Burbank prohibiting nighttime takeoffs. Lockheed Air Terminal, Inc. v. City of Burbank, supra, 318 F. Supp. 914. After carefully studying the legislative history of the Federal Aviation Act of 1958, the court concluded "that Congress intended to centralize full and dominant control of the navigable air space in the Federal Government" and that Burbank's curfew, enacted in a good faith effort to control noise, was barred by the Commerce Clause. Id. at 318 F. Supp. 925, 928.

The Ninth Circuit Court of Appeals affirmed, holding that the pervasiveness of federal regulation in air commerce, the national interest, and the nature of air commerce coalesce to the conclusion that state and local regulation of air commerce is preempted by federal law:

> "In this case, we have found the conclusion of federal preemption 'unavoidable.' Furthermore, the Federal Aviation Act also contains language of exclusivity. 49 U.S.C.S. § 1508 declares that the United States possesses and exercises 'complete and exclusive national sovereignty in the airspace of the United States . . . .' That is the same type of expression which the Supreme Court found in the Federal Tobacco Inspection Act to evidence Congressional intent to establish a wholly federal system which States were powerless even to supplement. Campbell v. Hussey, 368 U.S. 297, 82 S.Ct. 327, 7 L.Ed.2d 299 (1961)."
> Id. at 457 F.2d 675.

In United States v. New Haven, supra, 447 F. 2d 972, East Haven had sued

New Haven in Connecticut state court alleging New Haven had acquired land for its clear zone at the Tweed New Haven Airport illegally under state law. The state court agreed and issued an injunction forbidding flights over the disputed clear zone. This decision was upheld by the Connecticut Supreme Court.

The United States sued in federal district court to reopen the runway and to enjoin enforcement of the state court injunction. The federal court issued a preliminary injunction against the state court order, and the Second Circuit affirmed, ruling that the federal government alone has the authority to restrict use of navigable airspace, including airspace needed for landing and departure at local airports. Id. at 447 F. 2d 973.

On remand, the district court issued a permanent injunction against the state

court order. Again the Second Circuit affirmed, stating:

> "It is quite evident, as Chief Judge Blumenfield found, that the airspace above the East Haven land acquired by New Haven is within the meaning of 'clear zone' as defined by 14 C.F.R. 151.9(b). The clear zones, as part of the navigable airspace, are subject to federal regulations, and the orders of the Connecticut courts infringed upon the federal power.
>
> * * * *
>
> 'State legislation purporting to deny access to navigable air space would therefore constitute a forbidden exercise of the power which the federal government has asserted.' 447 F. 2d 972 at 973.
>
> Thus, East Haven cannot enforce its rights under Connecticut law by obtaining a state court injunction which infringes on federal regulation of navigable airspace."
> Id. 496 F. 2d at 454.

The Ninth Circuit has rejected an argument that the State of California could circumvent the holdings in Burbank

and City of New Haven by claiming that it was acting as "airport proprietor" of an airport owned by a local port authority when it enacted curfew limitations. San Diego United Port District v. Gianturco, 651 F.2d 1306 (9th Cir., 1981). More recently, the Eleventh Circuit ruled that federal law preempted a municipality's attempt to regulate an airport leased to a private operator. Pirolo v. City of Clearwater, 711 F. 2d 1006 (11th Cir. 1983).

The local concerns in the above cases, often affecting urban populations of millions, were certainly as great as Frederick County's interest in restricting flight activities at airports operating in farmlands and industrial districts. But the Federal Aviation Act preempts any local regulation that

intrudes into the exclusive federal domain of navigable airspace.

The Fourth Circuit has not explained why it has disregarded the teachings of the Second, Ninth, and Eleventh Circuits in this case. For this reason alone, writ of certiorari is justified.

2) The Court of Appeals Has Decided an Important Federal Question In Conflict with Applicable Decisions of This Honorable Court

The Frederick County ordinance has the purpose and effect of restricting use of navigable airspace at local airports by number or aircraft, aircraft ownership, aircraft performance parameters, and purpose of flight (non-training only). These are exactly the type of restrictions Congress has empowered only the FAA Administrator to impose. 49 U.S.C.S. § 1348. But the Fourth

Circuit's ruling grants to local zoning authorities concurrent power to regulate navigable airspace. This unprecedented ruling contradicts relevant holdings of this Honorable Court.

In Northwest Airlines v. Minnesota, 322 U.S. 292 (1944), Justice Jackson stated:

> "Air as an element in which to navigate is even more inevitably federalized by the commerce clause than is navigable water. Local exactions and barriers to free transit in the air would neutralize its indifference to space and its conquest of time.
>
> Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls. It takes off only by instructions from

> the control tower, it travels on prescribed beams, it may be diverted from its intended landing, and it obeys signals and orders. Its privileges, rights, and protection, so far as transit is concerned, it owes to the Federal Government alone and not to any state government." [Underscoring added.]
>
> Id., 322 U.S. at 303.

The impact of Congress's deliberate decision to create a "public easement" in navigable airspace was the basis for a Supreme Court decision finding the federal government liable in an inverse condemnation action brought by the neighbor of an airport. United States v. Causby, 328 U.S. 256 (1946). The airport neighbor claimed loss of property value in his 2.8 acre residence and chicken farm due to the landing and taking off of military aircraft directly over his property. The Court said:

> "It is ancient doctrine that at common law ownership of the land extended to the

> periphery of the universe - Cujus est solum ejus est usque ad coelum. But that doctrine has no place in the modern world. The air is a public highway, as Congress has declared. Were that not true, every transcontinental flight would subject the operator to countless trespass suits. Common sense revolts at the idea. To recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim."
> Id. 328 U.S. at 260-261.

More recently in Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973), this Honorable Court affirmed the Ninth Circuit's determination that Burbank's ordinance prohibiting landings and departures at night was preempted by federal law. The United States, not a party to the prior proceedings, filed a brief arguing against preemption of local noise ordinances. The Court responded:

> "The Solicitor General, though arguing against pre-emption, concedes that as respects 'airspace management' there is pre-emption. That, however, is a fatal concession, for as the District Court found: 'The imposition of curfew ordinances on a nationwide basis would result in a bunching of flights in those hours immediately preceding the curfew. This bunching of flights during those hours would have the twofold effect of increasing an already serious congestion problem and actually increasing, rather than relieving, the noise problem by increasing flights in the period of greatest annoyance in the surrounding communities. Such a result is totally inconsistent with the objectives of the the federal statutory and regulatory scheme.'"
> Id. at 627-628.

The balance of this Court's decision in Burbank was devoted to an analysis of the impact of the Noise Control Act of 1972 on local governments' power to regulate aircraft noise at airports. Based on its study of legislative history, the Court concluded that Congress did

not intend to disrupt the earlier case rulings upholding absolute federal control over airport and aircraft noise. Id. at 635-637. The Noise Control Act was designed to address the very serious problem of aircraft noise at the federal level, and the Court refused to ascribe any intention to open the door to regulation by local governments:

> "We are not at liberty to diffuse the powers given by Congress to FAA and EPA by letting the States or Municipalities in on the planning. If that change is to be made, Congress alone must do it." Id. at 640.

As this Court has declared, the air is a public highway. Airports approved by the FAA, whether private or public, are the citizens' egress and ingress to that highway. And only the FAA may impose restrictions on airspace at such airports.

3) The Court of Appeals Has Decided An Important Question of Federal Law In a Way That Could Lead to Disaster in the Skies and Frustration of Congressional Purpose

The consequence of the Fourth Circuit Court of Appeals' unprecedented decision to permit local regulation over navigable airspace could lead to an explosion of local regulations on navigable airspace at airstrips and airports throughout the Fourth Circuit. Each state, county, and municipality will be free to legislate its own airspace regulations whenever the local government decides that the FAA rules are not as restrictive as it likes. Pilots will have to check with local governments to ensure compliance with such local regulations whenever they land.

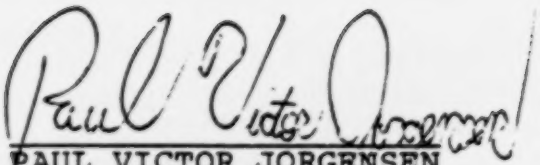
Unchecked regulation of navigable airspace by diverse authorities will lead to the "imminent possibility of

collision". See Schneideman v. ANR Pipeline Company, 56 USLW 4249, 4254 (March 22, 1988) (Such "imminent possibility of collision" between federal and state regulation is evidence of federal government's complete occupation of regulated field). And this "collision" of law could lead to real collisions in the air as pilots grapple with conflicting air control authorities.

Such chaos will frustrate the federal goal of uniform control and regulation over navigable airspace, and impair the public's right of access to navigable airspace. 49 U.S.C.S. Appx. §§ 1303, 1304.

Conclusion

For the reasons set forth, it is respectfully submitted that this petition for a writ of certiorari should be granted.



PAUL VICTOR JORGENSEN
Counsel of Record for
Petitioner
215 West Main Street
Post Office Box 850
Middletown, Maryland
21769
(301) 293-2212

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-3929

Amos D. Faux-Burhans,
Appellant,

versus

Board of County Commissioners of
Frederick County,
Appellee.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Frederick N. Smalkin, United States District Judge. (CA-87-2556-S)

Argued: July 7, 1988
Decided: September 9, 1988

Before WINTER, Chief Judge, and MURNAGHAN and SPROUSE, Circuit Judges

---

Paul Victor Jorgensen (Leland Ronald Jorgensen on brief) for Appellant. Lawrence Edward Speelman (Joseph E. Emerson on brief) for Appellee.

PER CURIAM:

Amos Faux-Burhans appeals the judgment of the district court granting summary judgment against him on his two federal claims and dismissing his pendent state action. In his action against the County Commissioners of Frederick County, Faux-Burhans demanded a declaratory judgment and injunction against the enforcement of a county zoning ordinance preventing certain activities at his private airstrip in the county. Alleging violation of 42 U.S.C. § 1983, he also demanded damages. We affirm.

Faux-Burhans' airport is located on his 125 acre property in a rural part of Frederick County, Maryland. At the time of the passage of the zoning ordinance in 1977, Faux-Burhans' father-in-law, Charles Rice, owned the property. In 1980 Rice obtained an exception to the

ordinance for an "aircraft landing and storage area." Rice and Faux-Burhans erected a hangar after which Faux-Burhans inspected and repaired airplanes on the property on a part-time basis. In 1983 Faux-Burhans bought the property and made improvements on the airstrip. In 1985 County inspectors, noticing the improvements, warned him that he was governed by the local zoning ordinance and that violations would result in a civil penalty.

The ordinance imposes the following restrictions on airports such as the one owned and operated by Faux-Burhans:

> (a) Minimum Size: Twenty-five (25) acres.
>
> (b) Principal User: Owner of parcel.
>
> (c) Intensity of Use: No more than two (2) aircraft may use the airfield or storage area.

(d) Aircraft: Limited to those which at ninety-five (95) degrees Fahrenheit require a maximum of one thousand eight hundred (1,800) feet or less of runway surface as recommended by the specific aircraft manufacturer.

(e) Clear Zone: Must be provided at both approach and departure end of runway. Such zone shall be a symmetrical trapezoid with a length of one thousand (1,000) feet and with the parallel sides being one hundred seventy-six (176) feet (adjacent to end of runway) and three hundred seventeen (317) feet respectively.

No structures are permitted within the clear zone. The clear zone must be under the ownership of the airfield owner.

(f) Area of Operation: No operation will be permitted within one hundred (100) feet of a property line, or one thousand (1,000) feet of any public or private institution devoted to education or human care.

(g) Use Limited: The airfield will not be for the use of instruction or training.

Frederick County Zoning Ordinance § 1-19-381 (1977).

Faux-Burhans asserts that the limitations imposed by the ordinance in effect prohibited: regular use by his neighbor for commuting to work in Pennsylvania; frequent use for aircraft inspection and repair; restoration and collection of vintage aircraft; use by high performance aircraft; instruction in airplane repair and maintenance; and storage of airplanes. He attempted to obtain a public airport exception from the County, but his request was denied.

During the course of construction at the airport and his attempts to obtain County approval, Faux-Burhans sought Federal Aviation Administration and state approval for the operation of his airport. Both the FAA and the state agency inspected and contingently approved the site. The FAA conducted an aeronautical

study and required him to reach a flight plan agreement with a neighboring airport.

Faux-Burhans has not, however, identified any federal statute or regulation explicitly or implicitly preempting the regulations imposed by the county ordinance involved here nor has he demonstrated any actual conflict between federal statutes or regulations and county requirements. The district court, in a well-reasoned opinion, reached this conclusion and also held that Faux-Burhans had presented no cognizable claim under § 1983. It also dismissed his pendent cause of action.

Agreeing with the reasoning of the district court, we affirm.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. S 87-2556

AMOS DENSLOW FAUX-BURHANS

v.

COUNTY COMMISSIONERS OF FREDERICK COUNTY

Paul Victor Jorgensen, Esq., Middletown, Maryland, for plaintiff.

Lawrence E. Speelman, County Attorney, and Joseph E. Emerson, Deputy County Attorney, Frederick, Maryland, for defendant.

Smalkin, District Judge.

Filed: December 17, 1987

MEMORANDUM OPINION

This is a case within the federal question and civil rights enforcement jurisdictions of this Court, 28 U.S.C. §§ 1331 and 1343, in which the plaintiff, owner-operator of a small private

airfield in Frederick County, Maryland, challenges the County's zoning restrictions on private airfield operations as set forth in § 1-19-381 of the Frederick County Zoning Ordinance. The challenge is based on three grounds. First, plaintiff claims that the County Zoning Ordinance, insofar as it attempts to regulate his airfield, is pre-empted by federal law. (Plaintiff's complaint does not identify the allegedly pre-empting statute(s), but his summary judgment opposition does.) Second, plaintiff claims that application of the County Zoning Ordinance to him constitutes state action which has deprived him of federal rights, giving him a claim under 42 U.S.C. § 1983 for "devaluation of his property, loss of investments, lost past and future income, and emotional distress and mental anguish." Third, and finally,

plaintiff asserts a state-law based claim, viz., that the Frederick County Zoning Ordinance's regulation of private airports is pre-empted by Maryland state law (Md. Transp. Code Ann. §§ 5-601 - 5-617 (1977)). The defendant has moved for summary judgment and has supplemented its motion as directed by the Court, and the plaintiff has filed a consolidated response. No oral hearing is necessary. Local Rule 6, D. Md.

The facts alleged in the plaintiff's complaint are entirely uncontested. In 1980, a special exception was granted to plaintiff's father-in-law to operate, within an agricultural zone, a private airfield in accordance with the the restrictions on use and operation of such airfields as set forth in the Frederick County Zoning Ordinance, at § 1-19-381 (1977). (These restrictions are

discussed post in some detail.) In 1983, plaintiff's father-in-law conveyed the airport parcel of his property to plaintiff, a federally licensed aircraft mechanic and inspector. Even before this conveyance, plaintiff had been using the field (on which he had erected a hangar) as a facility to inspect and repair general aviation (private) aircraft. After the conveyance, plaintiff paved the runway and improved the hangar. He registered the facility as a private airport with both the Federal Aviation Administration and the Maryland State Aviation Administration. When he was informed in 1985 by Frederick County authorities that his use of the improved facility was still subject to the restrictions of § 1-19-381, he applied for, but was denied, a public airport special exception (which would have allowed

greater use of the field than permitted under § 1-19-381). He also proposed an amendment to the County Zoning Ordinance, which was rejected. The plaintiff was, however, allowed to continue operating in accordance with the 1980 special exception, permitting use of the field as a private airport in conformity with the restrictions of § 1-19-381. This suit followed the denial of the public airport special exception. It does not challenge that denial, but, instead, is aimed directly at the use restrictions imposed on private fields by § 1-19-381.

The Court first addresses the federal pre-emption issue. Pre-emption of state and local regulation of a particular subject matter by Congressional enactment is a well-known, but infrequently encountered, phenomenon of American constitutional law, with

ancient (at least by American standards) origins. See Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1852). It poses entirely a question of federal statutory construction, depending for its application in a particular case upon ascertainment of the intent of Congress to enact a pervasive scheme of regulation of the subject matter. City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 633 (1973). In the City of Burbank case, the Supreme Court found federal pre-emption of local regulation of aircraft noise emissions at airports by federal statute, viz., the Federal Aviation Act of 1958, 72 Stat. 731, as amended by the Noise Control Act of 1972, 86 Stat. 1234, and the regulations promulgated pursuant thereto in 14 C.F.R., pts. 71, 73, 75, 77, 91, 93, 95 and 97. In City of Burbank and cases that have followed it, e.g., Pirolo v.

City of Clearwater, 711 F.2d 1006 (11th Cir. 1983), the local noise regulations in question clearly infringed upon the federally pre-empted regulation of navigable airspace, by directly affecting the manner in which, and the type of aircraft by which, flight operations were to be conducted from airports that were otherwise open to air traffic in general.

In the instant case, plaintiff can point to no federal statute or regulation explicitly or implicitly pre-empting the broad areas of regulation of the size, scope, and manner of operations at a private airport such as his. The ordinance in question does not regulate noise emissions or the actual conduct of flight operations within navigable airspace. Rather, the Frederick County zoning law regulates intensity of use (by number of aircraft), the type of aircraft that can

use the facility (by take-off distance required), the clear zone at the runway ends (by prohibiting building thereon), the locale of operation (by set-back requirements), and the type of aircraft operations (by prohibiting instructional flights.) Certainly, these are all areas of valid local regulatory concern, none of which is federally pre-empted, and none of which inhibits in a proscribed fashion the free transit of navigable airspace. And, just as certainly, no federal law gives a citizen the right to operate an airport free of local zoning control.

Nothing in City of Burbank itself requires a finding of federal pre-emption in this case, in view of its limited holding (extending only to regulation of noise emissions by operating aircraft). Indeed, the legislative history quoted in

(now Chief) Justice Rehnquist's dissenting opinion shows an intent by Congress not to restrict "the authority of units of local government . . . through the exercise of land use planning and zoning powers." 411 U.S. at 650. The plaintiff can point to no case law extending the pre-emption holding of City of Burbank to the lengths he now would seek to stretch it, and this Court holds that the ordinance in question is not federally pre-empted.

Plaintiff's second set of claims, under 42 U.S.C. § 1983, is likewise meritless. First, to the extent that a claim is attempted to be asserted for an unconstitutional taking of plaintiff's property without just compensation, the Court simply notes that, under the 1987 trilogy of land use cases decided by the Supreme Court, plaintiff has no claim.

He has not been deprived of "all use" of his property, because he continues to operate it (although not on the larger scale he would like) under and in conformity with the special exception granted his father-in-law in 1980. First English Evangelical Lutheran Church v. County of Los Angeles, 107 S. Ct. 1378 (1987). There has also been no taking in the sense of a non-consensual acquisition of public rights in, or imposition of a public easement upon, plaintiff's private property, given the County's legitimate, substantial interest in regulating the land used for airports, an interest that implicates safety and land-use (developmental) considerations far transcending the questions of noise and airspace regulation that may be beyond County control. Certainly, the County has a legitimate, substantial interest (which

was referred to in the plaintiff's zoning cases) in planning the future development of the presently agricultural area surrounding plaintiff's property, and it may properly decide that the Zoning Ordinance's use restrictions on private airfields promote the overall development scheme of the County. Thus, there has been no constitutional taking of plaintiff's property. Nollan v. California Coastal Com., 107 S. Ct. 3141 (1987); Keystone Bituminous Coal Ass. v. DeBenedictis, 107 S. Ct. 1232 (1987). To the extent that plaintiff argues deprivation of a federal right to free transit of airspace, the argument fails (in the context of the challenged Ordinance) for reasons discussed ante in connection with his pre-emption claim. Even if this right were infringed because of pre-emption, a concept flowing from the

Constitution's supremacy clause, there is no right of action recognized under 42 U.S.C. § 1983 for violation of the supremacy clause. Chapman v. Houston Welfare Rights Org., 441 U.S. 600 (1979). For the reasons stated, then, summary judgment will be entered for defendants on plaintiff's first two causes of action.

Finally, because plaintiff's federal claims are patently meritless, it is appropriate to dismiss his third, pendent state-law based cause of action. United Mine Workers v. Gibbs, 383 U.S. 715 (1966).

There is no need to discuss the res judicata argument raised by defendant.

For the reasons stated, an order will be entered separately, granting summary judgment for defendant, against plaintiff, on the plaintiff's first two

causes of action, and dismissing his third cause of action for want of federal subject matter jurisdiction. Fed. R. Civ. P. 12(h)(3).

/s/
Frederic N. Smalkin
United States
District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. S 87-2556

AMOS DENSLOW FAUX-BURHANS

v.

COUNTY COMMISSIONERS OF FREDERICK COUNTY

Order and Judgment

Filed: December 17, 1987

ORDER AND JUDGMENT

For the reasons stated in the foregoing Memorandum Opinion, IT IS this 17th day of December, 1987, by the United States District Court for the District of Maryland, ORDERED and ADJUDGED:

1. That defendant's motion for summary judgment BE, and the same hereby IS, GRANTED, on the plaintiff's first two causes of action;

2. That judgment BE, and the same hereby IS, entered in favor of defendant, against plaintiff, on plaintiff's first two causes of action;

3. That plaintiff's third cause of action BE, and the same hereby IS, DISMISSED for want of federal subject matter jurisdiction; and

4. That the Clerk mail a copy of the foregoing Memorandum Opinion and of this Order and Judgment to counsel for the parties.

/s/
Frederic N. Smalkin
United States
District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-3929

Amos D. Faux-Burhans,
Appellant,

v.

Board of County Commissioners of
Frederick County,
Appellee.

On Petition for Rehearing with Suggestion for Rehearing In Banc

---

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for

rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Sprouse, with the concurrence of Chief Judge Winter and Judge Murnaghan.

For the Court

/s/John M. Greacen
CLERK

APPENDIX D

Frederick County Zoning Ordinance Section 1-19-381. Aircraft landing and storage areas in A, LI and GI districts.

(a) Minimum Size: Twenty-five (25) acres.

(b) Principal User: Owner of parcel.

(c) Intensity of Use: No more than two (2) aircraft may use the airfield or storage area.

(d) Aircraft: Limited to those which at ninety-five (95) degrees Fahrenheit require a maximum of one thousand eight hundred (1,800) feet or less of runway surface as recommended by the specific aircraft manufacturer.

(e) Clear Zone: Must be provided at both approach and departure end of runway. Such zone shall be a symmetrical trapezoid with a length of one thousand (1,000) feet and with the parallel sides being one hundred seventy-six (176) feet (adjacent to end of runway) and three hundred seventeen (317) feet respectively.

No structures are permitted within the clear zone. The clear zone must be under the ownership of the airfield owner.

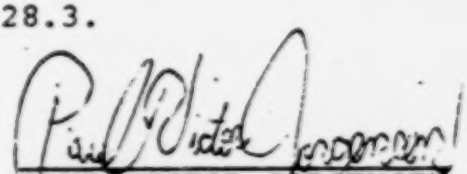
(f) Area of Operation: No operation will be permitted within one hundred (100) feet of a property line, or one thousand (1,000) feet of any public or private institution devoted to education or human care.

(g) Use Limited: The airfield will not be for the use of instruction or training.

(Ord. No. 77-1-78, § 40-72(A-5), 1-24-77)

Certificate of Service

I CERTIFY that on this Second day of December, 1988, I served three copies of the foregoing Petition for Writ of Certiorari by first class United States mail, postage prepaid, on Lawrence E. Speelman, County Attorney, Winchester Hall, 12 East Church Street, Frederick, Maryland 21701 in accordance with Supreme Court Rule 28.3.



PAUL VICTOR JORGENSEN
Counsel of Record for Petitioner
215 West Main Street
Post Office Box 850
Middletown, Maryland 21769
(301) 293-2212